

**BONUSES DURING THE NOTICE PERIOD****CASE LAW UPDATE!**

By Andrea Marsland

**What's the issue?**

In December, 2015, I reported on a case called *Paquette v. TeraGo Networks Inc.* In that case, Mr. Justice Perell determined that Mr. Paquette was not entitled to receive his bonus during the notice period because the terms of the bonus plan clearly and unambiguously stated that employees had to be "actively employed" to receive their bonus. Mr. Paquette was not happy with Mr. Justice Perell's decision on this issue, and appealed the decision to the Court of Appeal of Ontario. The only issue on appeal was Mr. Paquette's entitlement to his bonus during the notice period. Mr. Paquette took the position he was entitled to his bonus during the notice period and the Court of Appeal agreed with him.

**What did the Court of Appeal have to say?**

The Court of Appeal approached the issue in a different manner than Mr. Justice Perell. It did not agree that the issue to be determined was whether the terms of the bonus plan were ambiguous or not. Rather, the Court of Appeal determined that the issue should be approached as follows:

*[30] The first step is to consider the appellant's common law rights. In circumstances where, as here, there was a finding that the bonus was an integral part of the terminated employee's compensation, Paquette would have been eligible to receive a bonus in February of 2015 and 2016, had he continued to be employed during the 17 month notice period.*

*[31] The second step is to determine whether there is something in the bonus plan that would specifically remove the appellant's common law entitlement. The question is not whether the contract or plan is ambiguous but whether the wording of the plan unambiguously alters or removes the appellant's common law rights.*

The Court further determined that:

*[47] A term that requires active employment when the bonus is paid, without more, is not sufficient to deprive an employee terminated without reasonable notice of a claim for compensation for the bonus he or she would have received during the notice period, as part of his or her wrongful dismissal damages. [emphasis added]*



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The Court of Appeal awarded Mr. Paquette his bonus during the notice period. Notably, the Court in *Lin v. Ontario Teachers' Pension Plan Board*, another 2016 decision, came to a similar conclusion.

## **Employer Considerations?**

As the case law currently stands, the language "actively employed" will not suffice to remove an employee's entitlement to receive a bonus during the notice period. Having said that, the door is not closed to the idea of excluding bonuses during the notice period but these cases make it abundantly clear that the language used to remove the common law right has to be clear and unambiguous. If you have any questions regarding the content of this newsletter or need assistance with your plans, feel free to call me at 416.365.3703.